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MAILED
AUG 27 2010
OFFICE OF PETITIONS

In re Patent No. 7,641,659 : DECISION ON REQUEST FOR
Emstad, et al. : RECONSIDERATION OF
Issue Date: January 5, 2010 : PATENT TERM ADJUSTMENT
Application No. 10/726,329 :
Filed: December 1, 2003 :
Attorney Docket No. 1292.1228101 :

This is a decision on the petition filed on May 20, 2010, which is being treated as a petition under 37 CFR 1.705(d) requesting that the patent term adjustment indicated on the above-identified patent be corrected to indicate that the term of the above-identified patent is extended or adjusted one thousand, six hundred and eighty-six (1,686) days.

The request for reconsideration of the patent term adjustment under 37 CFR 1.705(d) is **DISMISSED**.

On January 5, 2010, the above-identified application matured into U.S. Patent No. 7,641,659, with a revised patent term of 1,039 days. An additional adjustment was entered pursuant to a decision mailed February 18, 2010, increasing the patent term adjustment to 1,576 days. By the instant petition, patentees assert that the patent term should be adjusted by 110 days pursuant to 37 CFR 1.702(b) and 37 CFR 1.703(b) and other considerations¹.

It is noted that patentees failed to account for the filing of the notice of appeal on November 7, 2008. The Office reminds patentees that the period consumed by appellate review, whether successful or not, is excluded from the calculation of B delay. See 35 U.S.C. 154(b)(1)(B)(ii). In this instance, the period consumed by appellate review is 130 days, beginning on the date on which the notice of appeal to the Board of Patent Appeals and Interferences was filed, November 7, 2008, and ending on the day the non-final Office action was filed, March 16, 2009. Thus, the B delay is 1,001 days (1,131 – 130). Accordingly, the patent term adjustment is 1,576 days (726 days of A delay + 1,001 days of B delay – 59 days of overlap – 92 days of applicant delay). In view thereof, the patent term adjustment of 1,576 days indicated in the patent is correct.

¹ It is noted that patentees argue that the period of delay under 37 CFR 1.702(a)(2) for the mailing of a non-final Office action on March 17, 2009, is 10 days. The period of adjustment for the mailing of the non-final Office action on March 17, 2009, is 59 days with said period beginning January 18, 2008, and ending on March 17, 2009.

Nothing in this decision shall be construed as a waiver of the requirement of 35 U.S.C. 154(b)(4) that any civil action by an applicant dissatisfied with a determination made by the Director under 35 U.S.C. 154(b)(3) be filed in the United States District Court for the District of Columbia within 180 days after the grant of the patent.

The Office is in receipt of the \$200.00 fee set forth in 37 CFR 1.18(e). No additional fees are required.

Further correspondence with respect to this decision should be addressed as follows:

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Telephone inquiries specific to this matter should be directed to the undersigned at (571) 272-3222.

/Kenya A. McLaughlin/

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